Rule 5, Ariz. R. Crim. Proc.

PRELIMINARY HEARINGS – Offer of proof………….Revised 12/2009

Once the magistrate determines that probable cause exists, the defendant has one last opportunity to prevent his being bound over for trial. This involves the defense's making an offer of proof. Rule 5.3(a), Ariz. R. Crim. P. An offer of proof requires that the defendant provide the court with specific details as to how the proffered evidence or testimony will overcome the State's probable cause demonstration. Rule 5.3(a), Ariz. R. Crim. P. The Comment to Rule 5.3(a) explains that, while the defense may not call witnesses at the preliminary hearing for discovery purposes, the defense is "entitled to present testimony which would tend to explain away the contemplated charge."

For an offer of proof to be sufficient, the defense theory must be "credible" and recite facts sufficient to overcome the State's evidence showing probable cause. *State v. Hutchinson*, 141 Ariz. 583, 587, 688 P.2d 209, 213 (App. 1984), *citing State ex rel. Pope v. Superior Court,* 113 Ariz. 22, 545 P.2d 946 (1976). In *Hutchinson*, the defendant was charged with sexual assault. At the preliminary hearing, he made an offer of proof that the victim had allegedly made an unfounded claim of rape against another man six years earlier. His only evidence was a minute entry showing that the magistrate at the previous preliminary hearing had dismissed the earlier complaint, finding no probable cause to bind over the defendant for trial on the rape charge. The magistrate in the later case refused to admit the offer of proof, finding insufficient evidence to show that the earlier charge was in fact unfounded. The magistrate reasoned that the earlier complaint might have been dismissed for reasons other than

insufficiency of the evidence – for example, the victim might not have appeared to testify at the preliminary hearing. On appeal, the Court of Appeals found no error, stating that the defendant's offer of proof lacked sufficient facts to show that the victim's previous accusation was unsubstantiated. *Id.*